No. 58

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

JOHN E. HODGES, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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I.

The Introduction and Point I of the Government's brief —extending to page 45—have little, if anything, to do with the issue before the Court in this case. This voluminous material apparently represents an attempt to get the Court to consider and dispose of this case on an issue which the Government must feel is easier for it, but which was not decided by the Court of Appeals, is not before the Court

in the present posture of this case, and was not presented by the petition for certiorari. The Government contends:

> . . . [W]e think this case can be disposed of on the simple ground that the files and records conclusively show that this prisoner is entitled to no relief even if the question of coercion is normally cognizable under Section 2255. [Govt. Br. 18-19.]
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> . . . [I]t is indisputable that there were controverted factual issues [on the question of coercion] which should properly be sent to the jury and that the trial judge was plainly correct in admitting the confessions and then submitting the question of voluntariness to the jury. Accordingly, the present case can be disposed of on the limited ground that the records and files conclusively prove that petitioner has no cause of action under 28 U.S.C. 2255. [Govt. Br. 25]

In an attempt to entice the Court into a consideration of this question, rather than the question decided by the Court of Appeals and presented by the petition for certiorari, the Government argues two interesting legal questions (not now involved in this case) as the predicate for its argument that on the merits petitioner is not entitled to relief. These are as follows:

1. What should be the scope of review in a 2255 proceeding: Should the 2255 court consider the question of coercion de novo, or should it decide only whether there was error in submitting the question of coercion *vel non* to the jury?

2. What evidence of coercion should the 2255 court consider: Only the trial transcript or additional testimony as well?

With regard to the first question, the Government argues at length that the scope of review on collateral attack should be no broader than that available on direct appeal; that is, the question should be, not whether the confession

was coerced, but whether the trial judge erred in submitting the question to the jury.[1]

With regard to the second question, the Government argues that a 2255 proceeding should be heard on the trial transcript alone without new evidence or testimony (absent exceptional circumstances).[2]

If it is correct on both these points, then, the Government argues, it is clear that on the merits of this case the prisoner is not entitled to relief because the trial court committed no error at the trial. We emphatically disagree with this conclusion.

But the point we wish to stress here is that none of these questions is presented to the Court in the present posture of this case. The Court of Appeals held only that a federal conviction based on a coerced confession could not be

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[1] While this would appear to be correct, the scope of review on collateral attack would be broader if the scope of review on direct appeal were concomitantly broader. The scope of review on direct appeal would, of course, be broader if this Court should find that the appropriate procedure in federal courts in determining the admissibility of an allegedly coerced confession should be that the trial judge himself determines the question of coercion *vel non* before submitting it to the jury for their determination, instead of the current practice in which the court decides only whether or not there is sufficient evidence for a jury to find that the confession was voluntary.

[2] At this point in this case, it is, of course, an entirely moot question as to whether new evidence should be heard because this case was heard in the Court of Appeals on the basis of the trial transcript alone. There can, therefore, be no possibility of the Court of Appeals' having erred in considering new evidence.

Of course, there was new evidence with regard to the circumstances surrounding petitioner's failure to take a direct appeal, but this was made necessary by the loss of the reporters notes of the 2255 hearing in the district court (See Pet. Br. 6, fn. 3). This new evidence has nothing to do with whether or not the confession introduced at the criminal trial was in fact coerced. We discuss the Government's attack on the lateness of this evidence surrounding petitioner's failure to take a direct appeal, *infra*, at pp. 7-8.

attacked collaterally in the absence of a direct appeal. It did not consider what evidence a district court should consider in a 2255 proceeding *if* collateral attack were permitted on this ground. It did not consider what the scope of review should be *if* collateral attack were permitted on this ground. The Court of Appeals ruled only that a collateral attack on the basis of a coerced confession was not cognizable under Section 2255. In so doing, the Court specifically assumed that the confession had been coerced. It was therefore irrelevant whether the claim should be heard on the trial record or on the basis of a new hearing; or whether the question should be (1) whether the confession was coerced or (2) only whether the district court erred in submitting the question of coercion to the jury. The Court of Appeals simply held that under no circumstances short of Government obstruction of an appeal would collateral attack be permitted under Section 2255 on the basis of the admission of the coerced confession. The only question presented by the petition for certiorari was whether this narrow ruling of the Court of Appeals was correct. The only question argued in petitioner's brief on the merits is this narrow question.

There will be time enough to argue the interesting questions which the Government raises in its Introduction and Point I if they arise after this case has been remanded to the Court of Appeals and from there to the district court. Then we may consider what should be the scope of review by the district court and the evidence on which its decision should be made, as well as whether petitioner has a claim on the merits. But these questions are not present in the current posture of the case before this Court. The only question now before the Court is whether a claim of coerced confession may be made under Section 2255 in the absence of a direct appeal.

II.

We would also like to take exception to the implication in the Government's brief that a *little* coercion is all right

—as long as it is not too much. Throughout its brief the Government recognizes that a federal conviction based on a coerced confession may be collaterally attacked if it is *really* coerced: "We are willing to assume with petitioner that a conviction based on an admittedly coerced confession may be voided whenever that fact clearly appears" (Govt. Br. 24; see also Govt. Br. 56). The Government appears to be arguing that a federal conviction based on a coerced confession may be collaterally attacked whenever the Government admits that the confession was coerced. Presumably, it would do so upon clear evidence that the rack and thumb screws were applied. If, however, the case is closer—or arguable on both sides—then the defendant may not obtain a ruling on the question of coercion or on the correctness of the submission of this issue to the jury. Thus, the Government seems to contend that, where the question of coercion is arguable, collateral attack should not be permitted in order to resolve the question. Only where the question is clear beyond argument should collateral attack be permitted.

This approach simply does not make sense. There is no such thing as "a little coercion." A confession is either coerced or it is not. A confession is no less coerced because the Government is able to make an argument to the contrary. Certainly the Government's argument to the contrary is not controlling and is no substitute for a judicial determination. In none of the landmark cases in this Court dealing with coerced confessions has the prisoner's attack gone unopposed. To argue as the Government does that a ruling on the question of coercion *vel non* should be denied simply because the question is arguable, is the worst sort of question begging. It should be squarely rejected by this Court. And all the petitioner asks here is that his claim be heard, and determined, not by the Government, but by the courts.

III.

When it comes to meeting the question presented by the petition for certiorari, the only reason the Government is

able to find as to why collateral attack should not be allowed to correct a federal conviction based on a coerced confession is that such an attack would require a district court to rehear the question of coercion.

It is true that permitting collateral attack would require a district court to rehear this question. But is it not a small price to pay in order to give a prisoner an appellate ruling on so basic a claim—one which, if true, is so abhorrent to all western and civilized jurisprudence? In many instances where the Government admits collateral attack should be permitted, the district court is required to hear on collateral attack questions which it has previously decided. The Government confesses that:

> . . . We can conceive of cases where the failure to appeal can be the kind of special circumstance justifying reconsideration of the admissibility of a confession under 28 U.S.C. 2255 in order that a defendant may have the appellate review of that issue of which his failure to appeal deprived him. Unquestionably that would be true if the failure to appeal were due to some misconduct by the government. Relief may also be available, even where the government is not at fault, under other circumstances such as misinformation by the court or court attaches. [Govt. Br. 57]

In the hypothetical cases in which the Government admits collateral attack would be available, as well as in other cases which could be imagined, the district court would be required to rehear a question that it had previously decided. If it is not so terrible in those cases, why is it so terrible here? In all of these cases, the district court is asked to reconsider a question in order that, if it adheres to its previous ruling, the question may be taken to a higher court.

This is not as burdensome on the courts as the Government seems to assume (Govt. Br. 51). It would not, as the Government argues, significantly increase the number of frivolous petitions. Even the Government recognizes

that the claim of coercion "has been in recent years so rare in federal courts" (Govt. Br. 48). Moreover, if a district judge chooses, he may easily deny the motion simply on the ground that he has ruled on the question previously. In this way the question could be quickly brought to the Court of Appeals. Finally, it should be noted that the courts have not been flooded with 2255 petitions resulting from rulings that coerced pleas of guilty may be collaterally attacked (See Pet. Br. 28).

IV.

The Government also argues that one of the reasons for permitting collateral attack of state convictions—namely, the need to provide a convenient federal forum for hearings on federal constitutional claims—is not present here where the prisoner's claim was initially heard in a federal court. This is true. But the Government erroneously concludes from this that the absence of this consideration should automatically result in a denial of the opportunity to attack the federal conviction collaterally. The fallacy of this logic is apparent. The question is not whether the same considerations are present in a 2255 case as are present in a 2254 case. The question is whether the competing policy considerations which *are* present in a 2255 case justify on balance this Court's permitting collateral attack. We submit for the reasons set forth in our main brief that they do.

V.

When the Government comes finally to consider the reasons surrounding this petitioner's failure to appeal, it condemns him for not explaining his failure to appeal until so late a date. Its basis for this argument is that petitioner did not present to the district court at his 2255 hearing the reasons surrounding his failure to appeal.[3] The factual basis for the Government's argument is pure conjecture.

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[3] Certainly there was no earlier opportunity—prior to his 2255 hearing—at which he could present these facts.

The reporter's notes for the 2255 hearing in the district court have been lost, as present counsel discovered when they were appointed by the Court of Appeals (See Pet. Br. 6, fn. 3). We therefore cannot be sure what transpired at this hearing. It is certainly probable that counsel proferred evidence as to the circumstances surrounding petitioner's failure to appeal. Moreover, as the Government concedes, the Court of Appeals considered the affidavits explaining the failure to take a direct appeal.

In its discussion of these affidavits of counsel and petitioner, the Government argues that they should not be believed:

> In the light of these facts the present affidavits are too cautiously worded to carry the conviction that failure to appeal was really the result of petitioner's ignorance. [Govt. Br. 59]

If the Government wishes to contest the truth of these affidavits, it would seem that the proper procedure would be, not for this Court simply to disregard them, but for a hearing to be held on the issue they affect. And a hearing is all that petitioner asks of this Court.

CONCLUSION

For the reasons stated in our main brief and for the additional reasons in this reply brief, it is respectfully submitted that the judgment below should be reversed.

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